No. 6593

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

18

LI BING SUN,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This appeal is from an order of the District Court for the Southern Division of the Northern District of California, denying appellant's petition for a writ of habeas corpus (Tr. pp. 27 and 28).

FACTS OF THE CASE.

Appellant is a male Chinese, 26 years of age. He left the United States for China on November 22, 1929 after having obtained a Laborer's Return Certi-

ficate (Respondent's Exhibit B, p. 1). He returned to the United States aboard the SS. "President Cleveland", which arrived at San Francisco on November 26, 1930, one year and four days after his departure. He was thereupon excluded by a Board of Special Inquiry which found that the right to return under the certificate was limited by statute to one year, and that appellant had not brought himself within the exception allowed by the statute for two reasons:

> *First.* Because he had not satisfactorily established that he was rendered unable sooner to return by sickness or other cause of disability beyond his control.
>
> *Second.* Because he presented no certificate of a United States consular representative certifying the facts of any alleged disability. (Tr. pp. 19 to 22, inclusive.)

The board's decision was affirmed by the Secretary of Labor on appeal (Resp. Exhibit A, pp. 30, 29).

THE STATUTE.

Section 5 of the Chinese Exclusion Act of September 13, 1888 as amended and extended (8 U. S. C. A., Sec. 275) provides that:

> "No Chinese laborer in the United States shall be permitted, after having left, to return thereto, except under the conditions stated in the following sections."

Section 6 of said Act (8 U. S. C. A., Sec. 276) limits the privilege of return to laborers who have certain kin or certain property in the United States.

Section 7 (8 U. S. C. A., Sec. 277) provides that a Chinese person claiming the right to leave and return shall procure a return certificate prior to departure and that:

> "No Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required."

That section provides further, as follows:

> "The right to return under the said certificate shall be limited to one year; but it may be extended for an additional period, not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, and certified by such representative of the United States to the satisfaction of the Chinese inspector in charge at the port where such Chinese person shall seek to land in the United States * * * "

The validity of the certificate, therefore, is limited to one year, and it may be extended only when two conditions concur:

(1) The applicant must have been rendered unable to return within the year by sickness or other cause of disability beyond his control, and

(2) The facts of the alleged disability must have been fully reported to and investigated by a consular representative of the United States and certified by said representative to the satisfaction of the immigration officials.

THE ISSUES.

Appellee contends that the order of the Court below denying the petition for writ should be affirmed, for two distinct reasons:

(1) The decision of the administrative tribunals that appellant was not rendered unable to return within the year by sickness or other cause of disability beyond his control is final.

(2) Appellant failed in any event to bring himself within the statutory exception because he did not report the facts of the alleged disability to a consular representative for his investigation and certification.

ARGUMENT.

1. THE DECISION OF THE ADMINISTRATIVE TRIBUNALS THAT THE APPLICANT HAD NOT ESTABLISHED THAT HE WAS RENDERED UNABLE TO RETURN WITHIN THE YEAR BY SICKNESS OR OTHER CAUSE OF DISABILITY BEYOND HIS CONTROL IS FINAL.

It is to be noted that by express terms of the statute the right to return is limited to one year but "*may*"

be extended not to exceed an additional year. This power to extend the time may be exercised only when sickness or other disability beyond the applicant's control has rendered him unable sooner to return, and only when the facts of such disability are certified "to the *satisfaction* of" the immigration officials.

It is obvious, therefore, that the power to extend the time for reentry is discretionary with the immigration officials, and is only to be exercised when they are satisfied that the delay was caused by such a disability as is mentioned in the statute. Necessarily their discretion could not be interfered with on habeas corpus.

> "* * * in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."
>
> *Nishimura Ekiu v. U. S.,* 142 U. S. 651, at 660.
> *Lem Moon Sing v. U. S.,* 158 U. S. 538, at 544.

On principle, it would seem that the inquiry into the facts need proceed no further than this. However, we shall touch upon the evidence on the issue of fact passed upon by the executive officers.

Section 23 of the Immigration Act approved May 26, 1924 (8 U. S. C. A., Sec. 221) provides:

> "Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the Immigration laws."

The most recent expression of the United States Supreme Court is contained in the opinion of Mr. Justice Holmes in

> *U. S. ex rel. Polymeris et al. v. Trudell,* 52 S. Ct. 143, decided January 4, 1932,

wherein the relators were seeking to return without a visa after a temporary visit abroad and the statute there involved prohibited reentry without such a visa, except under such conditions as may be prescribed by regulations of the Secretary of Labor. In that case Mr. Justice Holmes said:

> "The relators have no right to enter the United States unless it has been given to them by the United States. The burden of proof is upon them to show that they have the right. Immigration Act of 1924, Sec. 23, 43 Stat. 165 (U. S. Code, Tit. 8, Sec. 221, 8 U. S. C. A., Sec. 221) * * * The relators must show not only that they ought to be admitted, but that the United States by the only voice authorized to express its will has said so."

The statutes likewise expressly provide that the decision of the Board of Special Inquiry and of the Secretary of Labor "shall be final".

> 8 U. S. C. A., Secs. 153, 174.

In

United States v. Ju Toy, 198 U. S. 253, at 262,

the Supreme Court said:

> "It is established, as we have said, that the Act purports to make the decision of the Department final, *whatever the ground on which the right to enter the country is claimed*—as well when it is citizenship as when it is domicil and the belonging to a class excepted from the Exclusion Acts. *United States v. Sing Tuck,* 194 U. S. 161, 167; *Lem Moon Sing v. United States,* 158 U. S. 538, 546, 547."

In

Chin Yow v. United States, 208 U. S. 8,

the Supreme Court said:

> "If the petitioner was not denied a fair opportunity to *produce* the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. *Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all.* It must not be supposed that the mere allegation of the facts opens the merits of the case, *whether those facts are proved or not.* And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, *even though no contrary or impeaching testimony was adduced.*"

And in conclusion the Supreme Court said:

> "But unless and until it is proved to the satisfaction of the Judge that a hearing properly so-called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In

Tisi v. Tod, 264 U. S. 131,

the Supreme Court said:

> "We do not discuss the evidence; because the correctness of the judgment of the lower court *is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct* or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."

In the recent case of

Louie Lung Gooey v. Nagle, 49 Fed. (2d) 1016,

the Court said:

> "We cannot too often repeat that in immigration cases of this character brought before us for review, the question is not whether we, with the same facts before us originally, might have found differently from the Board; rather is it a question of determining simply whether or not the hearing was conducted with due regard to those rights of the applicant that are embraced in the

> phrase 'due process of law.' *Tang Tung v. Edsel,* 223 U. S. 673. Even if we were firmly convinced that the Board's decision was wrong, if it were shown that they had not acted arbitrarily but had reached their conclusions after a fair consideration of all the facts presented, we should have no recourse."

With these fundamental principles in mind, we proceed to analyze the facts as disclosed by the evidence before the immigration authorities.

Appellant, as we have stated, departed from the United States on November 22, 1929. The report of the American Consul General at Hongkong (Respondent's Ex. A, p. 26) is as follows:

> "Li Bing Sun applied personally August 14, 1930, for assurance of favorable action on overtime certificate after expiration one year, was examined by the United States Public Health Officer this office and certified able to return to the United States, was advised to return to San Francisco before November 22nd. On September 20th he applied by mail for extension and was informed of provisions of law concerning issuance of overtime certificates and the necessity for submitting proof of disability beyond control, in his case a medical certificate. No further record. Apparently secured approval of his form for passage arriving United States before November 22nd and later changed plans without reference this Consulate General."

The last sentence of that cablegram is borne out by the endorsement on the reverse of appellant's return certificate showing that he appeared at the Consulate General at Hongkong on October 20, 1930, and that his form was indorsed for passage by a vessel sailing on *October 23, 1930* (see reverse of certificate—Respondent's Ex. B, p. 1).

The record shows, therefore, that on August 14, 1930, while he still had more than four months left to return to the United States within the year, appellant applied for assurance that at the expiration of the year he would be granted a favorable overtime certificate, and that he was then examined and *found to be able to return* to the United States and was then advised to return before the year expired.

It is also shown that a month later he applied to the Consulate by mail for an extension and was requested to "fully report the facts," as required by the statute, by furnishing a medical certificate showing said facts. It is shown that appellant ignored this request to supply the facts of the alleged disability.

It is shown further that a month later, viz., on October 20, 1930, appellant appeared at the Consulate and obtained an endorsement allowing him to book passage on a vessel sailing on *October 23, 1930 without* any *suggestion* of *disability.* He did not, however, proceed to the United States on October 23d, but, as we shall show, elected to remain over for a later sailing.

Upon arrival at San Francisco appellant testified before the Board of Special Inquiry as follows:

"Q. How many visits have you made to China as a laborer on Form 432?

A. Two.

Q. Did you know prior to leaving on both of those two visits that you must return to the U. S. within one year from the date of your departure?

A. Yes.

Q. What caused you to return to the U. S. after a year from date of departure?

A. I was suffering from boils on my feet and on account of that I had to postpone my return to the U. S. I expected to return on the 'Pres. Grant' *but I thought that being four days overtime would not cause any difficulty in my landing.*

Q. When did the 'Pres. Grant' leave Hongkong?

A. About the 30th day of the 8th month, this year, Chinese reckoning (October 21, 1930).

Q. When did you cease having trouble from boils?

A. About the 16th day of the 8th month, (October 7, 1930).

Q. Then you deliberately delayed your return to the U. S. until the 'Pres. Cleveland' sailed. Is that right?

A. I was detained for about two weeks in Hongkong on visits to the doctor for examination.

Q. Do you mean the U. S. Public Health doctor?

A. Yes. * * *

Q. When you were in Hongkong did you go to the American Consulate?

A. Yes.

Q. Do you remember the date when you first went there?

A. It was before I went to the U. S. Public Health Service. It was about the 29th day of the 8th month. (October 20th)

Q. You knew then that you could not return here on the 'Pres. Grant', did you not?

A. Yes.

Q. Why did you not get an overtime certificate from the Consul?

A. I attempted to secure an overtime certificate but the American Consul refused to issue it to me. He did not state any reasons for refusing to do so." (Tr. pp. 17 to 19, incl.)

In his examination, therefore, appellant at first attributed his failure to return within the time allowed to the fact that he was suffering from boils.

This particular claim, as appellant now tacitly concedes in his brief, is without substance. Appellant was examined on August 14th in China and was found to be able to return to the United States then. On September 20th he requested a certificate of disability from the American Consul but ignored the Consul's request that he furnish a report of the facts in the form of a medical certificate. If such a disability existed, appellant was required under the act to report the facts fully to the American Consul for his investigation and certification. He was requested to do this by sending a medical certificate, and this he did not do.

Appellant's second version is that "I expected to return on the President Grant but thought that being four days overdue would not cause any difficulty in my landing". We shall advert to this statement later.

Appellant argues that he would have returned on a vessel leaving Hongkong about October 21st or October 23rd but that he was delayed two weeks by quarantine restrictions.

We might remark here that "a quarantine is not 'actus Dei' but an ordinary incident of travel by sea, to be contemplated by one undertaking a voyage" (21 Opn. Atty. Genl. at p. 576).

In any event it is not shown that appellant could not have returned by the vessel sailing from Hongkong on October 23, 1930, which would have brought him here well within the year.

Appellant in his brief assumes that this sailing was on October 21st. The endorsement of the Consul, however, on the reverse of the laborer's return certificate (Respondent's Exhibit B, p. 1) shows that he was scheduled to sail on October 23, 1930. His own testimony merely is that the sailing was *"about"* October 21st. It may be taken as established, therefore, that the sailing was on October 23rd, since the notation of the Consul was made at Hongkong only three days before said sailing, and it may be assumed that said notation was in accordance with the facts as then disclosed to the Consul.

Appellant states that he expected to return by that sailing. The notation of the Consul shows that the Consul was informed that such was appellant's intention. Remember, in all this transaction, there is no suggestion of disability. Appellant, however, says that he thought that being four days over time would not cause any difficulty in his landing. The Secretary of Labor was of the opinion that this was the real reason for his failure to return within the year, and that appellant elected to remain over one sailing in sanguine assumption that as to him the limitation of the statute would not be enforced (Respondent's Exhibit A, p. 29).

Appellant's argument now is that he ran afoul of a quarantine regulation which held him at Hongkong for about two weeks longer than he had expected.

This argument is not supported by the record. The inspection card of the United States Public Health Service at Hongkong (Respondent's Exhibit B, p. 3) shows that appellant was vaccinated on October 18, 1930 and appeared for inspection only on that date and on October 20th and October 21st. There is nothing in the record showing that he appeared for inspection or was required to appear for inspection at any time between October 21st and the date when he actually sailed, two weeks later.

There is in the record a certificate of the United States Public Health Service, issued on November 4th, 1930, the day appellant actually sailed for the United

States, certifying that appellant had complied with the provisions of executive order of June 21, 1929, "and as far as can be ascertained he has not been in contact during the last 14 days with anyone suffering from cerebro-spinal meningitis" (Respondent's Exhibit B, p. 2). From this appellant would have us assume that the executive order mentioned required appellant's detention for 14 days and that he was so detained for 14 days prior to November 4th and hence was unable to sail on the vessel departing about October 21st or October 23rd.

This assumption is likewise without basis in the record. While appellant stated that he was detained for about two weeks on visits to the doctor for examination, the inspection card shows that the only visits he made were on October 18th, October 20th and October 21st. The certificate that as far as could be ascertained the passenger had not been in contact, during the 14 days previous to sailing, with anyone suffering from cerebro-spinal meningitis does not state that the passenger was detained during these 14 days or required to report for inspection during those 14 days.

As a matter of fact, the executive order of June 21, 1929, No. 5143, promulgated by President Hoover under authority of Section 7 of the Act of February 15, 1893, regarding quarantine powers, merely directed that no person might come from any port in China, except under such conditions as the Secretary of the Treasury might prescribe.

. The regulations of the Secretary of the Treasury which were in force at the time appellant embarked from Hongkong were those issued on November 6, 1929, the pertinent portion of which is as follows:

> "1. Persons shall be permitted to embark for United States ports only * * * under the immediate supervision of a medical officer of the United States Public Health Service, who shall assure himself that such persons are free from signs or symptoms of meningitis.
>
> "2. Persons *known* or *suspected* by the medical officer to have resided within 14 days in premises in which meningitis then existed or otherwise having had direct contact with cases of meningitis, shall not be permitted to embark."

The regulations, therefore, do not require detention for 14 days nor inspection for 14 days, but merely prohibit the embarkation of persons *known* or *suspected* to have been in contact with the disease within 14 days. The inspection card in the record shows that appellant appeared for inspection only on October 18, October 20th and October 21st.

So far as the record shows there was absolutely nothing to prevent appellant from sailing on October 23, 1930. The inspection card shows that his inspection was completed on October 21st. Furthermore, as stated above, quarantine restrictions are necessary incidents of ocean travel and should be contemplated by the passenger.

Certainly appellant showed nothing which prevented him from sailing even earlier than October 23rd. His alleged sickness up to October 7th does not appear to have furnished any such reason, because on August 14th he was able to return, and on September 20th he claimed to be disabled from returning but declined to furnish the facts of the alleged disability by filing a medical certificate.

In view of the conflicting and unsatisfactory character of the showing offered by appellant as to why he did not return within the year, we submit that there was certainly nothing arbitrary in the refusal of the executive authorities to exercise their discretion in his favor by finding that he was rendered unable to return within the year by a disability beyond his control.

This Court has passed upon similar facts in two cases.

In

Nagle v. Toy Young Quen, 22 F. (2d) 18,

the appellee obtained a certification of the facts from the Consul on the claim that his delay beyond the year was caused by illness of his mother, resulting in his marriage being delayed. On arrival at San Francisco he testified that he was delayed by illness of his mother and that he had to remain in China to care for her. The Department was not satisfied that his delay was actually due to the illness of his mother, as he claimed. This Court said:

> "As the reasons given by petitioner for delay in returning were found by the Immigration officials to be insufficient in fact, and as their conclusion is in harmony with the statute cited, the demurrer was well taken and should have been sustained."

In

> *Nagle v. Won Bing Jung,* (C. C. A. 9) 22 F. (2d) 20,

the appellee obtained a certification of facts from the Consul and the file also contained a statement from the American Consul that the appellee had applied for a certification alleging that he had been afflicted with hernia but that a medical examination disclosed no sign of such an affliction. Before a board of special inquiry the appellee stated that he was delayed by unsettled conditions in China, making travel connections impossible. This Court said:

> "In the light of the contradictory statements made by petitioner the court will not disturb the well-supported finding of the examining authorities."

In the case at bar there is a similar situation. The appellant's original claim of disability by illness was found, on examination by the medical officer on August 14, 1920, to be unfounded. In his second attempt to obtain assurances of an extension, likewise based on alleged physical disability, he did not comply with the Consul's request to furnish a medical certificate show-

ing the facts. He now claims that quarantine restrictions kept him beyond the year. His testimony, however, would tend to indicate that he intentionally remained in China until too late for him to return within the year.

Certainly there is nothing surprising in the fact that the executive authorities were not satisfied of the existence of such a disability as the statute contemplates, upon this state of the record.

In

Tulsidas et al. v. Insular Collector of Customs,
262 U. S. 258 at 266,

the Supreme Court said:

> "It was for them to establish their exemption from the prohibition of the law, for them to satisfy the Insular officials charged with the administration of the law. If they left their exemption in doubt and dispute, they cannot complain of a decision against it."

In the same case the Supreme Court made the following significant statement:

> "It would seem, therefore, as if something more is necessary to justify review than the basis of a dispute. The law is in administration of a policy which, while it confers a privilege, is concerned to preserve it from abuse and, therefore, has appointed officers to determine the conditions of it, and speedily determine them, *and on practical considerations, not to subject them to litigious*

> *controversies, and disputable, if not financial, distinctions."*

Where the facts are so disputable as they are in the present case, and where the showing as to the alleged disability is so unsatisfactory and incomplete, we submit that there are no grounds for interference with the executive decision that appellant had not brought himself within the exception authorized by the statute to be made.

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2. **APPELLANT FAILED TO BRING HIMSELF WITHIN THE STATUTORY EXCEPTION, BECAUSE HE DID NOT REPORT THE FACTS OF THE ALLEGED DISABILITY TO A CONSULAR REPRESENTATIVE FOR HIS INVESTIGATION AND CERTIFICATION.**

As we have pointed out above, the statute permits extension of the time for return under a laborer's return certificate only where certain disabilities exist, and in such cases the statute expressly provides further that the

> "facts *shall* be fully reported to and investigated by the consular representative of the United States * * * and certified * * * to the satisfaction of the Chinese Inspector in charge * * * ."

It is obvious that the purpose of this requirement is to insure proper investigation of the facts in China, where investigation would be productive of result. This statutory mode has obviously been prescribed to insure against false claims being made upon arrival

in the United States which could not be so effectively investigated or combatted here.

It is contended in appellant's brief that the absence of a consular certificate of the facts in this case is due to no omission of appellant, but to a dereliction of the Consul.

In this contention appellant points to his statement, "I attempted to secure an overtime certificate but the American Consul refused to issue it to me" (Tr. p. 19).

Consuls are public officers, as to whom the maxim "*omnia praesumitus rite facta*" applies, especially in the exercise of quasi-judicial functions.

Nowhere in the record is there a scintilla of evidence that it was ever claimed before the Consul or reported to him that appellant was being held for fourteen days by the Public Health Officers. The endorsement of the Consul on the reverse of the laborer's return certificate expressly shows that on appellant's last appearance before the American Consul on October 20, 1930, the Consul was led to believe that appellant was sailing from Hongkong on October 23, 1930, the Consul having noted that information upon the certificate, with no suggestion of any claim of disability. This also is in accordance with appellant's first explanation of the reason for his delay beyond the year, viz., that he expected to return on the steamer "President Grant", but thought that being four

days overtime would not cause any difficulty in his landing (Tr. p. 17). He gambled and lost! His statement later in the examination, that he was detained for about two weeks on visits to the doctor for examination, is obviously an afterthought. As we have heretofore pointed out, the record does not bear out the claim that he was actually prevented from sailing in time to arrive in the United States within the year by any quarantine regulation or inspection.

Nowhere in his testimony did appellant state that he had reported the facts of this alleged delay to the Consul. The brief merely assumes that he made such a report, and further assumes in the face of the presumption of *rite facta,* that the Consul was derelict in his duty, and failed to investigate or certify facts reported to him. Certainly, every presumption of official regularity is opposed to any such inference, particularly in the absence of evidence not only that appellant was actually prevented from sailing sooner by restrictions imposed upon him by the public health officers, but also that he ever reported such alleged impediment to the Consul.

Appellant attempts to dispose of the Consul's notation on the reverse of the return certificate dated October 20, 1930, that the holder was sailing on October 23, 1930, by a statement that the Consul had no authority to limit or extend the appellant's stay abroad. But the significance and purpose of that endorsement, as appellant is doubtless well aware, is that

the travel documents of aliens in the Orient are endorsed by the American Consul to permit them to book passage for the United States without question. As indicated by the endorsement and by the Consul's cablegram, on October 20th appellant called at the Consulate and obtained approval of his form to sail on October 23rd. Whatever occurred to cause a change in that arrangement, it is obvious that appellant never thereafter returned to the Consulate nor informed the Consul of any contemplated or necessary change.

The authorities cited by appellant are not in point.

The cases of

Nagle v. Wong Bing Jung,

and

Nagle v. Toy Young Quen, supra,

we have already discussed. In those cases there was a Consular certificate of the facts of the alleged disability, but the Immigration authorities found that the appellees had not established that the delay beyond the year was caused by a disability beyond their control, and this Court held that the determination of the Immigration authorities on that point could not be interfered with.

In the case of

Ex parte Woo Show How, 17 Fed. (2d) 652,

which appellant cites, the applicant likewise presented a certificate of facts by the Consul and the Board

found, "the applicant has exhibited scars on one of his legs that indicate healed sores, and his claim of disability may be true." Hence in that case questions of the existence of the disability, and of absence of a Consular certificate of the facts, were not involved. The applicant in that case was excluded because he did not arrive until after the second year had expired, the statute limiting extensions to not more than a year. The facts were, however, that the applicant had reported the facts to the Consul in time to permit him to return well within the second year, but instead of making an investigation and certification of the facts, favorable or unfavorable, the Consul refused to certify the facts at all. Subsequently the superior officers of the Consul in the Department of State at Washington instructed the Consul that his action was erroneous, and that he should certify the facts. Were it not for the admittedly erroneous omission of the Consul in that case, the applicant would have arrived within the time allowed for the extension to which he was admittedly entitled.

The case of

Ex parte Yee Gee, 17 Fed. (2d) 653,

involved virtually the same situation. There, the applicant presented an overtime certificate of the Consul, and the Department of Labor found that his claim of delay due to illness and disrupted communications "is probably true", but that due to a mistake of the Consular Officer in refusing to furnish a certificate of the facts until advised some months later by the Depart-

ment of State that such refusal was erroneous and that he should certify the facts, the applicant did not arrive in the United States until after the period of a year for which a certificate might be extended had expired.

In each of those cases, therefore, it was conceded that so far as the alleged disability was concerned, the applicants were entitled to an extension. In each of those cases, likewise, the applicants had fully reported the facts of the alleged disability to the Consul. There was no dispute about either of those points. The applicants in those cases, although entitled to the extension of one year, and although they had obtained Consular certifications of the facts entitling them to such extension, were prevented from returning within the period for which the extension might be granted by an admittedly erroneous stand of the Consular Officer which resulted in the withholding of the proper Consular action until the period for extension had expired.

It is obvious that the doctrine of these cases is in nowise applicable to the facts of the case at bar. It will be noted that the opinion in the *Yee Gee case* was written by the same District Judge who decided the case at bar in the Court below.

In the case at bar, not only has appellant failed to satisfy the officers of the existence of any disability preventing his return within the year, but the record shows that he did not report the facts of the alleged

disability, upon which he *now* relies, to the Consular Officer and made no attempt to have such facts investigated or certified by the Consul.

Appellant objects to the action of the Secretary of Labor in considering the report made by the Consul relative to the Consul's record of this case. It will be observed, however, that upon receipt of this communication from the Consul, appellant's Washington attorney was advised of it, and was allowed ten days within which to review it (Respondent's Exhibit "A", page 28). Thereafter, appellant's Washington attorney filed an additional brief on January 30, 1931, stating that he had examined the communication from the American Consul, and stating further:

> "This communication appears to fully confirm the applicant's testimony on this point." (Respondent's Exhibit "A", page 24.)

Appellant's attorney made no objection to the consideration of the Consul's communication. He made no request for any continuance or opportunity to furnish any additional evidence after he had examined that communication.

From this it is immediately obvious that there was no unfairness here.

In

Kamiyama v. Carr, 44 Fed. (2d) 503, at 505,

this Court said:

> "Where an alien is represented by an attorney before the Immigration Authorities, it is clear

> that the very least that can be required of such a party so represented is that he should object in such proceedings to the unfairness of which he later complains to the Court in habeas corpus proceedings."

The Court also said in that case:

> "It is sufficient, however, to say that after this recommendation was made, appellant argued the case before the Board of Review, without any objection to the recommendation in that regard and without making any contention that the statement of the inspector should not be considered by the Board of Review."

See, also:

> *Soo Hoo Hung et al. v. Nagle* (C. C. A. 9), 3 Fed. (2d) 267, at 268.

In the cases cited at page 28 of Appellant's Brief, evidence was considered without the knowledge of the alien or his attorney, and neither the alien nor his attorney was given any opportunity to meet it.

The ultimate contention of appellant is that it is immaterial whether or not he reported the facts of the alleged disability to a Consular Officer.

Such a contention is directly in the teeth of the statutory provision that the facts *shall* be fully reported to and investigated by the Consular Officer. If his contention be correct, there is no need for that requirement in the statute because no applicant need report the facts of the alleged disability to the Consul.

Any applicant might disregard that provision in the statute entirely, and proceed to the United States for a determination of his right to enter without making any report to the Consul.

While we are not here concerned with the wisdom of the statutory requirement, the necessity for some such procedure is well exemplified in the present case, wherein an effort to ascertain here just what the facts are relative to the delay occurring in China, is attended with such difficulty and doubt.

Appellant cites:

U. S. ex rel. Patti v. Curran, 22 Fed. (2d) 314.

However, the documents in that case were permits issued under Section 10 of the Immigration Act of 1924 (8 U. S. C. A. Sec. 210), and the statute relative thereto expressly states that the permit shall have no effect except to show that the holder is returning from a temporary visit abroad, and that the permit shall not be construed as the exclusive means of establishing that fact. Furthermore, no alien is *required* to obtain such a permit, but any alien "may make application" for such a permit.

In the case of

U. S. ex rel. Gentile v. Day, 25 Fed. (2d) 717,

which appellant cites, the quota Act of 1921 (42 Stat. 5, 540) was involved. That statute exempted from the quota restrictions aliens of certain professions. The applicant in that case was admitted for a temporary

visit in exemption of the quota, but it later turned out that at the time of his entry he was of an exempt class, because he was an artist. The Court merely held that the fact of his having temporarily entered as a visitor did not alter the fact that on his arrival he was entitled to permanent entry as an artist.

We can see no conceivable analogy between those cases and the case at bar.

CONCLUSION.

The extension of a laborer's return certificate is, by express terms of the statute, only to be allowed in the discretion of the Immigration Officials when they are satisfied that the delay was caused by disability beyond the applicant's control. As a condition precedent to such extension, it is required that the facts of the alleged disability be fully reported to the Consul abroad for his investigation and certification. Appellant failed to show satisfactorily that he was delayed by such a disability. His ultimate reliance is on an alleged delay by certain quarantine restrictions. We have shown that this claim is not borne out by the record. In any event, a quarantine restriction is an ordinary incident of ocean travel, which should be contemplated by a passenger. Furthermore, there is no evidence whatever that appellant ever reported any such alleged disability to the Consul, and the record shows that no such report was made.

We submit that the order of the Court below was correct and should be affirmed.

Respectfully submitted,

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